IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE.

WRIT PETITION NO. 856 OF 2005..

Polymermann(ASIA) P.Ltd. ..Petitioners.
vs.
The Union of India & ors. ..Respondents.

Shri Manish Desai with Shipla Sharma i/b M/s Paras Kuhad & Associate for the petitioners.

Shri S.S. Pakale with A.M. Sethna for the respondents.

CORAM: V.C.DAGA &
J.P.DEVADHAR,JJ.
DATED: 16-3-2005.

ORAL JUDGMENT: (Per V.C. Daga,J.)

1. The present petition seeks to challenge the action of respondent No.4 in seeking to take coercive steps to recover the duty of Rs. 8,02,815/- along with interest thereon in the sum of RS. 4,63,847/-.

2. The petitioners herein are also claiming directions against respondent Nos. 3 and 4 restraining them from taking any coercive action against the assets and properties of the petitioner-Company pursuant to the notices issued from time to time; without obtaining prior consent from the Board for Industrial and Financial Reconstruction (BIFR), under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

Factual Matrix:

3. The factual matrix reveals that the petitioners are an industrial Unit having its factory and registered office at MIDC ,Ambad, Nasik. The petitioner-Company is engaged in the business of manufacture of polymer chemicals, mainly polyol and polyurethane systems; designs office-wared and other allied products. The operations of the company, were however, adversely affected from the financial year 1999-2000, resulting in complete erosion of the worth of the company in view of its accumulated losses. Resultantly, it was required to file a Reference under the provisions of section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 (SICA), with BIFR registered as Case No. 219/2004. The petitioner- Company contends that an enquiry is deemed to have commenced under section 16(1) of the SICA in the matter of petitioner-Company. Thus, in view of the bar/embargo imposed by the provisions of section 22(1) of the SICA against the coercive action for recovery of dues comes into operation.

4. The petitioner-Company states that it has received a letter from the office of the Assistant Commissioner, Central Excise & Customs- Respondent No.4 herein, in July 2004, claiming interest in the

sum of Rs. 5,22,847 alleging default of payment of excise dues. The petitioner- Company claims to have responded to the said letter vide its letters dated 17th May 2004, 30th July 2004 and 14th February 2005. The officers of the petitioner claims to have met respondent No.4 and informed them of the registration of their Reference under the provisions of SICA with the Board. They also claims to have explained the exact legal position with respect to embargo on the right of the creditor to recover its dues clamped by section 22(1) of the SICA. The petitioner- Company since received another notice dated 17.2.2005 threatening to take coercive steps under section 11 of the Central Excise Act, 1944, has approached this Court under Article 226 of the Constitution of India, to injunct respondent Nos. 3 and 4 from taking any coercive action against the assets and properties of the petitioner-Company.

Submissions

5. Learned Counsel appearing for the petitioner submits that in terms of the judgment and decision of the Supreme Court in the case of **Real Value Applicance Ltd. vs. Canara Bank and ors. (1998) 5 SCC 554,** an enquiry by BIFR can be deemed to have been commenced on registration of the company with BIFR and accordingly, the provisions of section 22(1) of SICA

come into play from the date of registration of the reference. Accordingly, on commencement of the enquiry, no coercive action can be employed by any creditor for recovery of their dues without the specific prior consent of the Board in view of bar imposed under section 22(1) of SICA, 1985, which reads as under:

> "Wherein in respect of an industrial company, an enquiry u/s 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal u/s 25 relating to an industrial company is pending, then, notwithstanding any contained in the Companies Act, 1956 (1 of 1956) or other law or the Memorandum & Articles of Association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for for the enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company shall lie or to be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

6. The Learned Counsel for the petitioner also relied upon another judgment of the Supreme Court the case of **Tata Davy Ltd. vs. State of Orissa and ors. (1997) 6 SCC 669,** wherein the Apex Court has observed that in the larger interest of the industrial health of the nation, section 22 of the Central Act requires all creditors seeking to recover their dues from sick

industrial companies in respect of whom an enquiry under section 16 is pending or a scheme is under preparation or consideration or has been sanctioned, to obtain the consent of the Board to such recovery. If such consent is not secured and recovery is deferred, the creditor's remedy is protected for the period of deferment and is, by reason of section 22(5), excluded in the computation of the period of limitation. Therefore, the respondent State cannot recover the arrears of sales tax from the appellant-Company without first seeking the consent of the Board in this behalf.

7. Learned Counsel for the petitioner also placed reliance on the judgment of the Apex Court in the case of **Gram panchayat and anr. vs. Shree Vallabh Glass Works Ltd. & ors. (1990) 2 SCC 440,** in order to reinforce his submissions referred to hereinabove.

8. Shri S.S. Pakale,learned Counsel appearing for the respondents has placed reliance on the judgment in the case of **Deputy Commercial Tax Officer vs. Corromandal Pharmaceuticals and ors. (1997) 10 SCC 649,** wherein the Apex Court observed as under:

> **"Such amounts like sales tax etc., which the sick industrial Company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within section 22 of the Act".** It

> added that the issue that had arisen before it had not arisen in the case of Vallabh Glass Works. It did not appear therefrom or from any other decision of this Court or of the High Courts " that in any of them, the liability of the sick company dealt with therein itself arose, for the first time after the date of sanctioned scheme. **At any rate, in none of those cases, a situation arose whereby the sick industrial unit was enabled to collect tax due to the Revenue from the customers after the 'sanctioned scheme' but the sick unit simply folded its hands and declined to pay it over to the Revenue, for which proceeding for recovery had to be taken."**
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> (Emphasis supplied)

9. Shri Pakale not only relied upon the aforesaid judgment of the Apex Court in the case of the Corromandal Pharmaceuticals (supra) but also pressed into service para 13 of the judgment of the Apex Court in the case of Tata Davy Ltd. and submitted that the Apex Court has clearly distinguished the case of Shri Vallabh Glass Works Ltd. (cited supra). According to him, as per judgment in Corromandal Pharmaceutical case followed in Tata Davy Ltd. (supra), the amount of sales tax collected by the sick industry company after the date of sanctioned scheme if legitimately could belong to the Revenue cannot be and could not have been intended to be covered within section 22 of the Act,then, on the same analogy, Central Excise Duty collected by the petitioner subsequent to the date of registration of Reference should also be treated alike and the respondent should be allowed to recover the same at least for the period subsequent to the date of registration of the reference with the Board, which,

on calculation, comes to Rs. 2,18,960/-.

10. Shri Pakale on the above premise urged that respondent No.4 cannot be prevented from recovering excise duty dues from the company for the period subsequent to the registration of Reference as such there is no justification for the petitioner to claim protection of section 22 of the SICA. He, thus, submits that respondent No.4 should not be injuncted from recovering their dues at least from June 2004 onwards. Shri Pakale went a step ahead and submitted that on the same analogy even the dues due and recoverable from sick industrial company prior to the registration of the Reference with the Board by no means can be said to belong to the sick industrial company, and therefore, recovery thereof can also be resorted to notwithstanding registration of Reference and pendency thereof with the Board. However, he agrees not to insist upon recovery of the dues prior to the period of registration of Reference.

CONSIDERATION:

11. Having heard rival contentions, considering the observations of the Apex Court in the case of Corromandal Pharmaceutical and observations made in para 13 of the subsequent judgment in the case of Tata Davy Ltd. (cited supra), the submissions advanced by Shri Pakale, appears to be reasonable and deserves

acceptance at least with respect to recovery of dues of the central excise collected by the petitioner from its customers subsequent to the date of registration of the Reference with the Board as the said amount of duty in the hands of the petitioner in the sum of Rs. 2,18,960/- belongs to the Revenue. As such, the amount collected cannot be and could not be intended to be within the sweep of section 22 of SICA.

12. Since Shri Pakale having agreed not to insist for recovery of dues prior to June 2004 by adopting coercive action, we do not think it is necessary for us to go into the last submission made by Shri Pakale with respect to the recovery of duty for the period prior to the registration of Reference. This aspect of the matter can be gone into in an appropriate case if necessary. In the peculiar facts and circumstances of the present case, we hold that the petitioner-Company cannot claim protection of section 22 of the SICA for the excise duty collected by them after registration of the Reference with the Board since they are holding this amount for and on behalf of the Revenue.

13. In this view of the matter, the respondents shall be free to recover their dues after the period of registration of Reference with the Board i.e. w.e.f. June 2004 but not for the prior period. In

the result, petition is partly allowed and Rule is partly made absolute in terms of this order with no order as to costs.

(J.P. DEVADHAR,I.) (V.C.DAGA,J.)